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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 803

COLORADO MILLING AND ELEVATOR COMPANY,
a Corporation,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Colorado Milling and Elevator Company, a corporation, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on September 8th, 1965.

OPINIONS BELOW.

The opinion of the United States District Court in favor of respondent has not been reported. The Court's findings of fact, conclusions of law and judgment are set forth in the printed record filed in the Court of Appeals, pp. 46-50, nine additional copies of which have been filed herewith pursuant to Rule 21 (4). The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix A.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 8, 1965 (infra, Appendix B, p. 34); a petition for rehearing was denied on October 6, 1965 (infra, Appendix C, p. 35); the Mandate of the Court of Appeals was issued October 19, 1965. (The parties have agreed informally to stay payment of, or execution upon, said judgment until proceedings with respect to this Writ of Certiorari have been concluded.)

Jurisdiction to issue the Writ rests on Title 28, U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Where the law of the State (Missouri) denies indemnity to an indemnitee for the consequences of its own negligence (in the absence of clear language in the indemnity contract manifesting an intention to do so), is the term "negligence" which bars indemnity in such cases, limited to negligence constituting a want of ordinary care or does it also include violation of a statutory duty which Missouri courts treat as "negligence per se"; in this case the duty imposed by the Safety Appliance Act to furnish to a shipper for its use a railroad box car equipped with an efficient hand brake? The District Court and the Court of Appeals so restricted the application of

the term "negligence" in refusing to deprive Respondent of its claims to indemnity under these circumstances.

2. Where the uncontroverted evidence shows the railroad made, at most, a visual inspection of the hand brake apparatus on the box car from the ground, which would probably not disclose the particular defect, and where it was also conceded that the railroad did not subject the brake to a manual test similar to that received in use, before delivering the box car to a shipper for its use, and that such a test would positively disclose the defect, would the District Court be justified in finding that the shipper had not met its burden of proving common law negligence on the part of the railroad so as to defeat the railroad's claim for indemnity? The Court of Appeals affirmed such a finding considering as competent and admissible evidence the testimony of railroad's witness that a mere visual inspection of safety appliances is customary in the area.

3. Regardless of the application of the label "negligence," either statutory or common law, would not public policy restrict, rather than extend, such indemnity contracts and thus intervene to defeat indemnity for respondent whose wrongful act (in furnishing a railroad car with a defective hand brake to a non-negligent shipper) caused the injury, where, as here, the intention to indemnify under such circumstances is not plainly expressed in the contract? The Court of Appeals considered this question only on the narrow basis of negligence.

STATUTES INVOLVED.

The Statutes involved are the Federal Safety Appliance Act, 45 U. S. C. A., Sections 1-16 and particularly Section 11, which provides:

> "It shall be unlawful for any common carrier subject to the provisions of Sections 11-16 of this title

to haul or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders; Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose." (Emphasis supplied.)

The Interstate Commerce Act, Title 49 U. S. C. A. also contains pertinent sections, particularly Section 26 (e), providing as follows:

"(e) It shall be unlawful for any carrier to use or permit to be used on its line any system, device, or appliance covered by this section unless such apparatus, with its controlling and operating appurtenances, is in proper condition and safe to operate in the service to which it is put, so that the same may be used without unnecessary peril to life and limb, and unless such apparatus, with its controlling and operating appurtenances, has been inspected from time to time in accordance with the provisions of this section and is able to meet the requirements of such test or tests as may be prescribed in the rules and regulations provided for in this section."

The Interstate Commerce Commission has issued regulations pursuant to the authority vested in it by the Act but which are not sufficiently important to the present proceeding to warrant their inclusion here verbatim. Title 49, Transportation, C. F. R. Part 131, Section 131.1 (a).

STATEMENT OF THE CASE.

Facts:

Petitioner considers the facts as stated in the opinion of the Court of Appeals to be substantially adequate for the purposes of this Writ with the addition of certain additional facts. The facts as set forth in the opinion of the Court of Appeals are as follows:

> "Terminal Railroad Association of St. Louis (Railroad) brought this action against Colorado Milling and Elevator Company (Industry) for reimbursement of an amount paid pursuant to a judgment obtained against it by an Industry employee. Recovery was claimed under the indemnity provisions of a side track agreement.[1] The Industry employee, Leeman C. Hahn, was injured because of the inefficient hand brake of the boxcar on which he was working.
>
> The boxcar had been received in interchange by Railroad from the Missouri Pacific and spotted on the Industry track for unloading. It was filled with wheat consigned to Industry. Industry unloaded the contents into receiving pits by means of a "shaker"

---

[1] The side track agreement contains many of the usual hold harmless provisions but the pertinent provision of the agreement reads:

"In the event that at any time the 'Industry', its servants or employes, shall move any car or cars set on the 'Industrial Track', the 'Industry' shall be solely liable for all the consequences, and shall defend and save harmless the 'Railroad' from all injury to persons resulting in death, or otherwise, and from all damage to property in any manner howsoever occasioned by, or arising out of such movement or movements of cars by the 'Industry', whether caused directly by such movement or movements, or resulting therefrom by reason of failure of such car or cars after having been moved by the 'Industry' to properly clear the adjoining tracks or trains, engines, or cars on such adjoining tracks, or persons riding on such trains, engines and cars, or otherwise howsoever."

mechanism installed on one of the Industry tracks.[2] The boxcar was then nudged by a trackmobile to start its movement towards a point where it would again be picked up by Railroad. Hahn was positioned on a platform at the brake end of the car for the purpose of controlling its speed and thereby coupling it with a stationary cut of cars already emptied. With this movement, Hahn turned the brake wheel five or six times to remove the slack. As the boxcar attained its customary speed of about four to six miles per hour, Hahn endeavored to tighten the brakes to effectuate a proper coupling. After winding the wheel some eighteen to twenty-five times, the brake did not respond and the boxcar collided with the standing cars, throwing Hahn off and resulting in his injury.

Hahn sued the Railroad, alleging a violation of the Federal Safety Appliance Act, 45 U. S. C. A. Section 1-16, and was successful.[3] **Hahn v. Terminal R. Ass'n.**, *supra.* Industry was requested to defend the action but refused, denying liability under the indemnity provisions of the agreement. Hahn's case was tried and decided on a violation of the Safety Appliance Act with the trial court refusing even to admit evidence of common law negligence.

Industry thereafter declined to reimburse the Railroad and this action was instituted. The case was brought in state court and removed on diversity grounds to the United States District Court for the Eastern District of Missouri. A jury was waived and the District Court decided in favor of the Railroad and entered judgment in the amount sued for."

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[2] A more detailed description of the shaker mechanism, the interchange procedure, the track locations, and the accident is contained in the Missouri Supreme Court opinion. Hahn v. Terminal R. Ass'n, ... Mo. ..., 355 S. W. 2d 867 (1962).

[3] Section 11 quoted verbatim, "Statutes Involved".

The additional pertinent facts are:

1. In the trial of the case of **Hahn v. Terminal R. Ass'n.**, *supra*, the railroad objected to the introduction by plaintiff of any evidence showing common law negligence of the railroad employees in regard to inspection and testing of the hand brake, on the grounds such was not an issue in the case. The trial court sustained the objections and refused to admit evidence of lack of ordinary care on the part of the railroad. The issues tried were the defective condition of the hand brakes; whether the box car was being used on the line of the railroad; the contributory negligence of plaintiff and damages. The Court of Appeals opinion (p. 5) points out that negligence, in the sense of lack of ordinary care, was not involved in the Hahn case, but this was due to Respondent's efforts and design as indicated by the Record (p. 44).

2. Petitioner denied indemnity on the grounds that the sole and proximate grounds of Hahn's injury was the negligence or wrongful act of the respondent railroad in furnishing a car with a defective hand brake in violation of railroad's statutory obligations and in violation of its common law duties to Petitioner and its employees, and, that, since the sidetrack agreement did not clearly provide for such indemnity, the law of Missouri did not require Petitioner to reimburse the railroad under such circumstances.

3. Motions of both parties for summary judgment were denied by the District Court which ruled that while proof of negligence was not a necessary element to recovery under the Safety Appliance Act, the railroad "might be precluded from indemnification by (Industry) under the contract" by a showing that the failure of the hand brake was in fact a result of the railroad's "negligence" and not merely a matter of statutory liability. Thereupon, a trial without jury was had on the issue of railroad's (com-

mon law) negligence. The railroad admitted that no more than a visual inspection had been made of the hand brake apparatus (Cf., Opinion of Court of Appeals, p. 6). The railroad was unable to produce upon subpoena any records that any inspections at all had been made. The evidence did not disclose the specific defect in the hand brake apparatus but Hahn turned the hand brake wheel on top of the box car 18-25 times without any braking action at all when tightening of the brakes is accomplished by a maximum of twelve turns in a properly functioning brake. The defect was either in the chain which would be discoverable by visual inspection from the ground, or the defect was in the gear housing unit approximately 12 feet above the ground which would not be discoverable without a disassembly of the mechanism or by manual turning the brake wheel a maximum of twelve turns.

4. It was not shown definitely when the defect in the brake occurred and the lower courts thought it possible it could have occurred after delivery to Industry. However, the railroad was held liable in the Hahn case for furnishing to Industry for its use a box car with a defective brake.

Decision of Court of Appeals and Reasons for Granting Writ:

A. The Court of Appeals decided that since negligence, in the sense of want of ordinary care, was not an issue in the Hahn case, the Railroad was not convicted of negligence merely because it was held liable to Hahn on the basis of its violation of an absolute statutory duty. The reasons this Court should grant Certiorari to review this holding are:

(1) Decisions of this court cited by the Court of Appeals to support the holding that negligence is not an issue in a Safety Appliance Act case were never intended to be applied to restrict or limit the scope of the term "negli-

gence'' in determining rights to indemnity. Such a holding is not only an improper application of this court's decisions but it is in conflict with other decisions of this court holding that the term ''negligence'' has a broader concept and means a disregard or breach of some duty imposed by law.

(2) This decision is in conflict with applicable state law as ruled by the Missouri Supreme Court which has repeatedly held that a violation of a statutory duty is ''negligence per se'', and that an indemnitee is not entitled to recover for the consequence of his own negligence unless the contract clearly so provides.

(3) The rights to indemnity for consequences of an indemnitee's own violation of a duty imposed upon him by Federal law is an important question of Federal law which has not been, but should be, settled by this Court, particularly in view of the widespread application of the Safety Appliance Act to claims against railroads and the widespread use by railroads of sidetrack agreements containing indemnity provisions.

B. The Court of Appeals decided that the District Court was justified in concluding that Petitioner (Industry) did not discharge its burden of proving common law negligence on the part of the respondent (Railroad) when all of the proof indicated, and it was conceded by respondent, that a visual inspection from the ground, at most, was all that was ever made of the safety appliances on the box car in question by the Railroad, and it was further conceded that such an inspection would not disclose this particular defect (unless it was in the chain) but that a manual turning of the brake wheel a maximum of twelve turns would disclose the defect. The reasons this Court should grant Certiorari to review this holding are:

(1) The decision as to the scope of the inspection and test of safety appliances on a railroad box car received

in interchange involves an important question of Federal law which has not been, but should be, settled by this Court and this Court should not approve the holding that evidence of a mere visual inspection which would not disclose a defect in a safety appliance and evidence that the safety appliance was never subjected to any test which would reasonably disclose the defect is competent evidence of the exercise of even ordinary care by the railroad.

(2) The decision is in conflict with applicable decisions of Missouri Courts to the effect that the railroad has a duty to subject railroad car safety appliances to a reasonable inspection and to a test similar to that received in use.

C. The Court of Appeals decided that public policy did not forbid a railroad to contract for indemnity not only for the consequences of its own sole negligence but also for the consequences of its violation of duties imposed by Statute, if the contract was sufficiently specific. However, even though this contract was found not to be so definite and specific, the Court of Appeals affirmed the judgment of the District Court. The reasons this Court should review this holding are:

1. Public policy would be best served by denying a railroad the right to escape ultimate liability for its wrongful acts by recovering its losses from a non-negligent shipper under general, non-specific indemnity provisions of a side track agreement. Otherwise, hurried and careless inspection and testing of railroad cars and the safety appliances therein would be encouraged and the purposes of the Safety Appliance Acts defeated as to a class of persons under the protection of the Acts. This is an important question of federal law which has not been, but should be settled by this Court.

2. Since this contract was found to have contained no definite and specific language or intention to indemnify

the railroad for the consequences of its own negligence, the decision in favor of the railroad in this case is in conflict with applicable Missouri cases involving an important question of Missouri law.

BASIS OF FEDERAL JURISDICTION IN THE DISTRICT COURT.

This action for indemnity was filed by respondent in the Circuit Court of the City of St. Louis, Missouri, and removed to the Federal Court by Petitioner on the grounds of diversity of citizenship under Title 28, U. S. C. A., Section 1441 et seq.

ARGUMENT.

As to Respondent's Violation of Its Statutory Duty Constituting "Negligence" Barring Its Rights to Indemnity.

Respondent was convicted in the Hahn case of furnishing to a shipper for use by its employees, including Hahn, a box car which was not equipped with efficient hand brakes in violation of the Federal Safety Appliance Acts, particularly Section 11, supra. The Missouri Supreme Court affirmed the jury verdict in the Circuit Court holding that this violation by Respondent was conceded by Respondent to be the proximate cause of Hahn's injuries, **Hahn v. Terminal R. Ass. of St. Louis**, 1962, 355 S. W. 2d 867, l. c. 870. No negligence was charged or proved against petitioner, Hahn's employer. Thus, the wrongful act, regardless of the label applied to it, was solely that of respondent.

This violation has been characterized by this Court and by the Missouri Supreme Court as a "wrongful act" or "negligence per se"; **Rush v. Thompson**, Mo., banc, 1947, 356 Mo. 568, 202 S. W. 2d 800, 806; **San Antonio and A. P. R. Co. v. Wagner**, 241 U. S. 476, 484, 36 S. Ct. 626, 630, 60 L. Ed. 1110, 1117; **Texas and P. R. Co. v. Rigsby**, 241 U. S. 33, 39, 36 S. Ct. 482, 484; **Moore v. Chesapeake & O. R. Co.**, 291 U. S. 205, 210, 54 S. Ct. 402, 404, 78 L. Ed. 755, 759; **Floyd v. Thompson**, 356 Mo. 250, 201 S. W. 2d 390, 393; **Urie v. Thompson**, 337 U. S. 163, 189, 69 S. Ct. 1018, 1034, 93 L. Ed. 1282 (1949).

In **Rush v. Thompson**, supra, the Court stated (l. c. 804):

> "Non-compliance with the Safety Appliance Act 'is a wrongful act' giving rise to liability; the Legis-

lative intent being to treat non-conformity 'as negligence', what is sometimes called negligence per se." Citing **San Antonio and A. P. R. Co. v. Wagner, supra.**

In **Texas and P. R. Co. v. Rigsby,** supra, this Court said (l. c. 484), "a disregard of the command of the statute (Safety Appliance Act) is a wrongful act. . . ."

In **Floyd v. Thompson,** supra, the Court said (l. c. 393):

> "A violation of the Federal Safety Appliance Act has been said to be negligence—what is sometimes called negligence per se. **Moore v. Chesapeake & O. R. Co.,** 291 U. S. 205, 54 S. Ct. 402, 404, 78 L. Ed. 755."

In **Urie v. Thompson,** supra, the Court said (l. c. 189):

> ". . . it clearly is the legislative intent to treat a violation of the safety appliance act as 'negligence' —what is sometimes called negligence per se" (citing San Antonio & A. P. R. Co. v. Wagner, supra).

This Court in the **Urie** case further held that the Safety Appliance Acts are substantially amendments to the F. E. L. A. and (in employee cases) dispense with the necessity of proving that violations constitute negligence; ". . . and making proof of such violations is effective to show negligence as a matter of law" (l. c. 189).

In this Court's opinion in the case of **O'Donnell v. Elgin, J. & E. Ry. Co.,** 338 U. S. 384, 390 (1949), 70 S. Ct. 200, 94 L. Ed. 187, relied upon by the Court of Appeals, it was stated that this Court had "swept all issues of negligence out of cases under the Safety Appliance Act". However, this Court was not holding that liability was imposed without any consideration of fault or wrongdoing. In that case, this Court ruled that the fault or wrong lay in the violation of the statutory duty, ". . . a failure of equipment to perform as required by

the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence . . ." (l. c. 390). The **O'Donnell** case is discussed in a note, 16 A. L. R. 2d 654, "Failure of Equipment Required by Federal Safety Appliance Act as Constituting Actionable Wrong." The author of this note holds that there are four different views of the effect on tort liability of the breach of a specific duty imposed by statute for the protection or benefit of others where the statute does not specifically provide for civil liability on the part of the violator. The first view of some courts is that the statute does not affect common law liability; the second is that the violation of the statute is merely presumptive evidence of negligence; the third is that the jury may infer negligence from the violation of the statute, that is, it is evidence only of negligence and no presumption of negligence arises; and fourth, the violation of the statute constitutes negligence per se. This fourth category is the position adopted by Missouri courts, as noted above.

The Court of Appeals misapplied the ruling of this Court in the **O'Donnell** case, supra, and other cases to like effect citing in the opinion (p. 4) to the effect that negligence was not an issue in a Safety Appliance case. Those cases are not proper authority for holding that a violation of the Safety Appliance Act does not involve a wrongful act on the part of the railroad whether it be called "negligence", "negligence per se", "wrongful act", "fault", etc. The Court of Appeals improperly limited and restricted the term "negligence". Most recognized definitions of negligence embrace any breach of duty imposed by law. In the case of **New York Central R. Co. v. White**, 243 U. S. 188, 37 S. Ct. 247, 250, 61 L. Ed. 667, this Court had this to say:

> "The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard

> of some duty imposed by law and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence."

Thus, Petitioner respectfully urges that decisions of this Court and the highest Court of the State of Missouri clearly hold a violation of duties imposed by the Safety Appliance Act constitute an actionable wrong and that such involves fault or wrongdoing on the part of the common carrier within the meaning of the term "negligence".

Next, the Missouri Courts have established by numerous decisions the generally accepted principle that an indemnitee may not recover indemnity for the consequences of his own wrongful act (negligence) unless the contract manifests an intention to grant indemnity under such circumstances in clear and unequivocal language; **New York Central R. Co. v. Chicago & E. I. R. Co.**, 360 Mo. 885, 231 S. W. 2d 174, 177 (construing Ill. law but same as Mo.); **Missouri District Tel. Co. v. Southwestern Bell Tel. Co.**, 388 Mo. 692, 93 S. W. 2d 19; **Terminal R. Ass'n of St. Louis v. Ralston-Purina Co.**, 352 Mo. 1013, 180 S. W. 2d 692; **Kansas City M. & B. R. Co. v. Southern Ry. News Co.**, 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380; **Paro v. Pennsylvania R. R. Co.**, Mo. App., 348 S. W. 2d 613, 616. In the **New York Central R. Co.** case, supra, the Missouri Supreme Court said (l. c. 177):

> "A contract of indemnity is not to be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts, 'where such intention is not expressed in unequivocal terms' (citing cases and authorities).
>
> There is greater reason for the strict construction of a contract of indemnity where the sole negligence involved is established to be that of the indemnitee, as here, . . ." (Citing authority).

The Missouri Courts never intended that the "negligence" which barred an indemnitee from recovering from the consequences of his own negligence against a non-negligent indemnitor should be limited to negligence in the sense of a want of ordinary care. In fact, the opposite is true as evidenced by the Missouri Supreme Court, en banc, in the case of **Rush v. Thompson**, supra. Thus, the adjudication of liability upon the respondent by the Missouri Courts in the **Hahn** case sufficiently established wrongdoing on the part of respondent to bar its rights of indemnity against petitioner in the event the contract did not expressly provide, or manifest a clear intention to provide, indemnity for the indemnitee's own negligence. Th contract in the case at bar did not clearly so provide. The holding of the United States District Court on that point as set forth in "Conclusions of Law," Number 3, as follows (Record, p. 49):

> "3: The Court finds that the contract provisions involved are not so definite and specific that they provide for indemnity for liability based on the negligence of the indemnitee in unequivocal terms."

With all due deference, the Court of Appeals failed to recognize that respondent's liability in the **Hahn** case was not based upon absolute liability, that is liability without fault, but was based upon liability for violation of an absolute duty. This distinction involves a material difference. In the former, respondent could be liable without fault, but in the latter, the fault is found in the failure to perform an absolute duty. This Court discussed this material distinction in the case of **Myers v. Reading Company**, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615:

> "The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a workmen's compensation law. (Footnote: See Griswold v. Gardner, 7

Cir., 155 F. 2d 333, 334, 337). As an interstate common carrier, however, it is subject to liability for injuries to its employees resulting from its violation of its absolute duty to comply with the Safety Appliance Acts'' (l. c. 485).

As to Respondent's Common Law Negligence Barring Its Rights to Indemnity.

After the District Court denied the Motions of both parties for summary judgment and indicated it would entertain a trial on the issue of respondent's ''negligence'', a trial was had and the uncontroverted evidence developed by petitioner from employees of respondent under subpoena revealed that the cars received by respondent in interchange are afforded a visual inspection only from the ground; that is, car inspectors have the duty of walking along the tracks and looking at the cars to determine if there is any observable defect. Even though some employees testified there should be written reports of such inspection, none were produced by respondent in response to subpoenaes duces tecum showing any inspection—visual or otherwise—was ever made. Since the brake wheel at the top of the car was turned 18 to 25 times by petitioner's employee, Hahn, without any braking action whatsoever, the expert testimony at both trials was to the effect that the defect in the brake must have been the chain or in the gear box housing about 12 feet above the ground on the end of the car just below the hand brake wheel. A defect in the chain would be visible but a defect within the gear housing would not be discoverable by any visual inspection. It would positively be discovered by manually turning the brake wheel located at the top of the box car a maximum of 12 turns. Over petitioner's objections, the District Court permitted respondent to submit rebuttal testimony to the effect that a visual inspection of railroad cars received in interchange was all that was customarily

made in this area. On the basis of this evidence, the district court ruled that petitioner had not met its burden of showing common law negligence on the part of respondent and ruled also that no negligence on the part of respondent was shown by its conviction of a violation of the Safety Appliance Act in the **Hahn** case. The Court of Appeals refused to disturb the finding of the district court on the issue as to respondent's common law negligence holding that the lower court's holding in this regard was supported by competent and admissible evidence. In the case at bar, respondent knew the use to which petitioner and its employees would put the car after it was delivered. Ordinary care would require greater diligence for the protection of petitioner's employees than a mere visual inspection of safety appliances. Ordinary care would require that they be **tested**. The opinion of the Court of Appeals in this respect is in conflict with applicable decisions of the highest courts of the State of Missouri on this point. In the case of **Brady v. Wabash Ry. Co.**, 329 Mo. 1123, 49 S. W. 2d 24, the Missouri Supreme Court denied a recovery to plaintiff on grounds not relevant here, but stated (l. c. 30):

> "We have heretofore seen that it is the positive duty of the carrier to inspect cars which are tendered to it for further transportation by another railroad. It must ascertain at its peril, whether the cars so tendered comply with the Safety Appliance Act. The inspection of the car before accepting it or using it on its lines is an act in conformity to and in carrying out its duty and not in violation thereof."

After that adverse decision the same plaintiff sued the delivering carrier Terminal Railroad Ass'n of St. Louis which case was also decided adversely to him by the Missouri Supreme Court, **Brady v. Terminal Railroad Ass'n** (banc), 340 Mo. 841, 102 S. W. 2d 903, but reversed

on appeal to the United States Supreme Court, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614. The Missouri Supreme Court pointed out that in its previous decision in the case against the Wabash it had stated that the Wabash had a non-delegable duty to inspect the car and ascertain at its peril whether it complied with the Safety Appliance Act and that the receiving carrier had the duty to reject and not to receive such cars. The court then went on to state (l. c. 905):

> "(1) In this connection we may add that a railroad company does not perform its duty to inspect hand holds on freight cars for the safety of employees, by having its inspectors merely pass by and look at them, but the hand holds must be subjected to a test similar to that they will receive in use" (citing cases).

The **Brady** case was quoted with approval on this point in the case of **Chicago, R. I. & P. R. Co. v. Chicago and N. W. Ry. Co.** (D. C. Ia.), 179 F. Supp. 33, 8 Cir., 280 F. 2d 110, wherein the district court discussed the fact that the plaintiff did not inspect the box car and went on to state that the receiving railroad does not perform its duty to inspect (hand holds) by merely looking at them, but must subject them to a test similar to that which they will receive in use. Misouri courts have imposed high standards on the part of railroads even with respect to their common law duties to furnish box cars in reasonably safe condition to shippers and their employees and they have held them liable for injuries received as a result of defective conditions of the box cars or the safety appliances under circumstances of inspection and lack of operational testing such as are present in the case at bar; **Stoutimore v. Atchison, T. & S. F. R. Co.**, 338 Mo. 463, 92 S. W. 2d 658; **Willis v. Atchison, T. & S. F. R. Co.**, 352 Mo. 490, 178 S. W. 2d 341; **Hawkins v. Missouri Pacific Ry. Co.**, Mo. App., 1914, 170 S. W. 459; **Patton v. Balt. & O. R. Co.**, 3 Cir. 1952, 197 F. 2d 732, 741.

The fact that a visual inspection only is customary among railroads in this area is not competent or admissible and should be accorded little or no weight where the safety of employees of shippers are dependent upon the railroad making a reasonable test or inspection of the equipment, **American Car & Foundry v. U. S. S.**, 211 F. 862 (8 Cir., 1914); **Parker v. Cushman**, 195 F. 715 (8 Cir., 1912); 68 A. L. R. 1400 "Custom as a Standard of Care", sub-section (f), Inspection and Tests, p. 1445.

Public Policy Would Not Be Served by Granting Indemnity in Favor of the Railroad Under These Circumstances.

Probably the best statement of the proposition urged here is contained in 27 Am. Jur., Indemnity, Section 15, p. 464, as follows:

> "It is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts, where such intention is not expressed in unequivocal terms. Public policy has been said to require such contracts to be restricted rather than extended, and the liability of the indemnitor is regarded as so hazardous, and the character of the indemnity so unusual, that there can be no presumption that the indemnitor intended to assume it in the absence of express stipulation".

The general rule is that such contracts are void and not enforceable, 27 Am. Jur., Indemnity, Section 11; 42 C. J. S., Indemnity, Section 7 (pp. 572, 573).

Thus, it seems that the interests of the public and the safety of employees and other persons dependent upon the condition of railroad equipment should take precedence

over any narrow construction of the term "negligence". The Court of Appeals in its opinion (pp. 9, 10) holds that there is no rule or public policy which would forbid a railroad from expressly contracting for indemnity to relieve itself from the consequences of its own negligence. However, the opinion of the Court of Appeals overlooks the fact that this contract, as construed by the district court, was not so specific and definite as to provide for indemnity for liability based on the negligence of the indemnitee in unequivocal terms (See Conclusions of Law, number 3, supra). Thus, the Court of Appeals did not properly apply the principles of public policy to the contract involved in this suit. As heretofore pointed out, most courts strictly construe such indemnity contracts against the party who drew them and do not extend them to exonerate a negligent indemnitee unless such an intention is clearly shown. The cases relied upon by the Court of Appeals involve factual situations where the contract containing indemnity language expressly relieved the railroad from the consequences of its own negligence, or was so clear that an intention to do so was manifested by the instrument. This was not the case here and the Court of Appeals did not modify the conclusion of the district court on this point. The decision is thus in conflict with public policy and the decisions of the Missouri Courts on an important question.

CONCLUSION.

No case has been found wherein this Court has examined or declared the rights of a common carrier to indemnity in the light of the carrier's violation of its obligations under the Safety Appliance Acts. Respectfully, there is widespread confusion among the State and Federal Courts as to the effect to be accorded a violation of these acts, as pointed out by this Court in the **O'Donnell** case, supra. While this Court has clarified and eliminated

much of that confusion, it has not spoken on the issues presented here. Thus, an important question of Federal and State law remains unsettled.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 17,812.

Colorado Milling and Elevator Company, a Corporation, Appellant,

v.

Terminal Railroad Association of St. Louis, a Corporation, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[September 8, 1965.]

Before Vogel, Matthes and Mehaffy, Circuit Judges.

Mehaffy, Circuit Judge.

Terminal Railroad Association of St. Louis (Railroad) brought this action against Colorado Milling and Elevator Company (Industry) for reimbursement of an amount paid pursuant to a judgment obtained against it by an Industry employee. Recovery was claimed under the indemnity provisions of a side track agreement.[1] The

[1] The side track agreement contains many of the usual hold harmless provisions but the pertinent provision of the agreement reads:

"In the event that at any time the 'Industry', its servants or employes, shall move any car or cars set on the 'Industrial

Industry employee, Leeman C. Hahn, was injured because of the inefficient hand brake of the boxcar on which he was working.

The boxcar had been received in interchange by Railroad from the Missouri Pacific and spotted on the Industry track for unloading. It was filled with wheat consigned to Industry. Industry unloaded the contents into receiving pits by means of a "shaker" mechanism installed on one of the Industry tracks.[2] The boxcar was then nudged by a trackmobile to start its movement towards a point where it would again be picked up by Railroad. Hahn was positioned on a platform at the brake end of the car for the purpose of controlling its speed and thereby coupling it with a stationary cut of cars already emptied. With this movement, Hahn turned the brake wheel five or six times to remove the slack. As the boxcar attained its customary speed of about four to six miles per hour, Hahn endeavored to tighten the brakes to effectuate a proper coupling. After winding the wheel some eighteen to twenty-five times, the brake did not respond and the boxcar collided with the standing cars, throwing Hahn off and resulting in his injury.

Hahn sued the Railroad, alleging a violation of the Federal Safety Appliance Act, 45 U. S. C. A., §§ 1-16, and

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Track', the 'Industry' shall be solely liable for all the consequences, and shall defend and save harmless the 'Railroad' from all injury to persons resulting in death, or otherwise, and from all damage to property in any manner howsoever occasioned by, or arising out of such movement or movements of cars by the 'Industry', whether caused directly by such movement or movements, or resulting therefrom by reason of failure of such car or cars after having been moved by the 'Industry' to properly clear the adjoining tracks or trains, engines, or cars on such adjoining tracks, or persons riding on such trains, engines and cars, or otherwise howsoever."

[2] A more detailed description of the shaker mechanism, the interchange procedure, the track locations, and the accident is contained in the Missouri Supreme Court opinion. **Hahn v. Terminal R. Ass'n**, ... Mo. ..., 355 S. W. 2d 867 (1962).

was successful.[3] **Hahn v. Terminal R. Ass'n,** *supra.* Industry was requested to defend the action but refused, denying liability under the indemnity provisions of the agreement. Hahn's case was tried and decided on a violation of the Safety Appliance Act with the trial court refusing even to admit evidence of common law negligence.

Industry thereafter declined to reimburse the Railroad and this action was instituted. The case was brought in state court and removed on diversity grounds to the United States District Court for the Eastern District of Missouri. A jury was waived and the District Court decided in favor of the Railroad and entered judgment in the amount sued for. We affirm.

Industry's primary attack is leveled at the District Court's ruling that the evidence failed to show any negligence by the Railroad.[4] It is first contended that under

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[3] Specifically, Hahn's action was under § 11 which provides:

"It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders; Provided. That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose" (Emphasis supplied).

[4] Finding of Fact No. 6:

"The evidence before the Court in this case fails to show negligence of plaintiff Terminal Railroad as a cause of the injury to Leeman C. Hahn. The evidence indicated that a defect in the hand brake could positively be discovered only by having a manual test of the brake by turning the brake wheel a number of complete turns and that such a test might be effective only if made while the car was in motion. The evidence shows that a visual inspection is the customary form of inspection re-

both Missouri and federal law a violation of the Safety Appliance Act constitutes "negligence" or "negligence per se." Indeed, some courts have used such terms in referring to violation of the Act, but the Supreme Court has made it implicitly clear that a violation of the Act is a breach of an absolute duty imposed by statute rather than negligence. This duty cannot be avoided by a showing of care—or a freedom from negligence, as the term is ordinarily used. Generally, actionable negligence presupposes fault which constitutes at least a part of the proximate cause of the resulting injury. In contrast, liability for breach of a statutory duty such as here involved is imposed irrespective of negligence which may or may not exist.

In discussing the absolute duty demanded by the Act, the Supreme Court said in **Myers v. Reading Co.**, 331 U. S. 477, 482-83 (1947):

> "Here it is not necessary to find negligence. A railroad subject to the Safety Appliance Acts may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which caused the injuries was on a car which the railroad was then using on its line, in interstate commerce, and that the brake was not an 'efficient' hand brake."

The Court also quoted from the earlier case of **Brady v. Terminal R. Ass'n.**, 303 U. S. 10, 15 (1938):

> "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous."

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quired by railroads in the St. Louis area, and the method customarily used by Terminal Railroad. The Court finds that reasonable care does not require plaintiff to inspect a car placed on the 'Industrial Track' by climbing the car and manually testing the brake wheel while the car is in motion" (Emphasis supplied).

In **O'Donnell v. Elgin, J. & E. Ry.**, 338 U. S. 384, 390 (1949), attention was called to the fact that the Court had earlier "swept all issues of negligence out of cases under the Safety Appliance Act"; and in **Carter v. Atlanta & St. Andrews Bay Ry.**, 338 U. S. 430, 433-34 (1949), the Court expressed that "[t]his Court has repeatedly attempted to make clear that this is an absolute duty not based upon negligence. . . ." Regarding the "normal efficiency" of the appliance in an action under the Safety Appliance Act, the Court stated in **Affolder v. New York, C. & St. L. R. R.**, 339 U. S. 96, 98 (1950), that "the duty under the Acts is not based on the negligence of the carrier but is an absolute one requiring performance 'on the occasion in question.'"

Thus, the ruling of the Supreme Court conclusively indicates that a violation of the Safety Appliance Act does ont imply that negligence, as that term is commonly used, was involved. Since negligence was not an issue in the **Hahn** case, *supra*, it follows that the Railroad does not stand convicted of negligence merely because of evidence of a violation of an absolute statutory duty.[5]

In a pretrial memorandum filed as a basis for denying motions of both parties for summary judgment, the District Court ruled that while proof of negligence was not a necessary element to recovery under the Safety Appliance Act, the Railroad "might be precluded from indemnification by [Industry] under the contract" by a showing that the inefficient operation of the appliance was in fact a result of Railroad's negligence, and not merely

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[5] The parties stipulated "that the case of **Leeman c. Hahn v. Terminal Railroad Association of St. Louis** . . . was submitted and tried upon the theory of a violation of § 11 of the Safety Appliance Act, . . . even though defendant [Industry] asserted a reservation as to whether the . . . Act technically confers such a right of action."

a matter of statutory liability. Thereupon, Industry locks on the argument that the Railroad was guilty of common law negligence in not furnishing it a reasonably safe car and in failing to make such an inspection as would disclose the defective condition of the hand brake.

The thrust of this contention is that Railroad's visual inspection of the hand brake apparatus, conducted from the ground, cannot reasonably be expected to reveal defects. Industry's expert testified that if the hand wheel was turned as many as twenty to twenty-five times without any braking action, there was a malfunction in the hand brake mechanism and that with respect to that brake, it had no braking action at all.[6] However, the hand wheel on a properly functioning brake cannot be turned more than twelve revolutions. The resulting expertise was that the failure here was necessarily in the chain at a point approximately twelve feet above the ground or in the gear housing unit which is located atop the car immediately behind the hand brake wheel and which is completely enclosed. Only a defect in the chain would be detectable by visual inspection, while all other defects causing this type malfunction would be located inside the enclosed housing unit. In either event, all possible defects responsible for such a failure are more reasonably detectable by tightening the brake wheel twelve turns rather than walking beside the car and merely looking at the mechanism.

The Railroad admitted that no more than a visual inspection had been made of the hand brake apparatus. The housing had not been disassembled nor had an employee climbed on top of the car and wound the hand brake twelve times. It did not discover by visual inspection any

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[6] As previously noted Hahn testified that in attempting to slow the car, he wound the brake wheel eighteen to twenty-five times without any braking effect.

defect or the car would have been "bad ordered" and sent to the rip track for repair. If any defect had been discovered, a report would have been filed reflecting the "bad order." No such report was filed although exception had been taken to a car in the same consignment from the inbound road.

The practice of other railroads in the St. Louis area is to make only a visual inspection of "hand brakes, safety appliances and under frames in the cars, running gear and undersils." Such inspections at interchange do not include climbing on the cars to set the hand brakes as such a requirement would greatly increase the number of car inspectors needed, and would greatly impede the movement of cars and trains through the terminal. An operational inspection at interchange is beyond the scope of that function and is not practical. See **Lowden v. Hanson,** 134 F. 2d 348 (8th Cir. 1943); **Canadian Northern Ry. v. Senske,** 201 F. 637 (8th Cir. 1912); **Waddell v. A. Guthrie & Co.,** 45 F. 2d 977 (10th Cir. 1930); **Shankweiler v. Baltimore & O. R. R.,** 148 F. 195 (6th Cir. 1906).

The record contains no evidence of the nature of the defect in the hand brake or whether in fact it was defective at all other than its failure to function on one occasion after it had been delivered to and moved by the Industry. Furthermore, the evidence does not show when the defect, if any, would become ascertainable by any kind of inspection. It is not known whether the defect occurred before or after the car was spotted on Industry's track, although their expert was of the opinion that the shaking operation utilized by Industry to unload the car did not damage the brake mechanism and cause its malfunction. We think it possible, as did the District Court, that the brake defect could have arisen after the inspection by Railroad and after delivery to Industry. There is no evidence to the contrary.

It is strongly urged that this evidence did not justify the Court's conclusion that Industry had failed to discharge its burden of proving negligence on the part of the Railroad. We disagree. The question of negligence is usually one of fact for the court and jury and not one of law. **United States Rubber Co. v. Bauer**, 319 F. 2d 463 (8th Cir. 1963); **United States v. Stoppelmann**, 266 F. 2d 13 (8th Cir. 1959); **Westborough Country Club v. Palmer**, 204 F. 2d 143 (8th Cir. 1953); **Consolidated Elec. Co-op. v. Panhandle E. Pipeline Co.**, 189 F. 2d 777 (8th Cir. 1951).

The findings of the District Court are presumptively correct and must be sustained unless clearly erroneous. As a reviewing court, we are not privileged to substitute our judgment for that of the District Court and must view the evidence favorably to the successful party. And if the District Court's findings are supported by substantial, competent evidence, they must be sustained. **Fremont Cake & Meal Co. v. Wilson & Co.**, 183 F. 2d 57 (8th Cir. 1950); **Federal Sav. & Loan Ins. Corp. v. First Nat'l. Bank**, 164 F. 2d 929 (8th Cir. 1947); **F. W. Fitch Co. v. Camille, Inc.**, 106 F. 2d 635 (8th Cir. 1939).

Issue is made of the Court's statements in its Finding No. 6 that the "evidence shows that a visual inspection is a customary form of inspection required by railroads in the area and the method customarily used by Terminal Railroad." We agree with Industry that compliance with a custom will not alone suffice to justify a conclusion of non-negligence on the part of the Railroad, but disagree with the contention that the evidence was not competent and should have been excluded. This Court and others have many times held that proof of custom while relevant and admissible in evidence of negligence is not conclusive thereof. **Sears, Roebuck & Co. v. Daniels**, 299 F. 2d 154 (8th Cir. 1962); **City of Richmond v. Atlantic Co.**, 273 F. 2d 902 (4th Cir. 1960); **Young v. Aeroil Products Co.**,

248 F. 2d 185 (9th Cir. 1957); **Northwest Airlines v. Glenn L. Martin Co.**, 224 F. 2d 120 (6th Cir. 1955), cert. denied, 350 U. S. 937 (1956). The Court's conclusion here was not grounded on custom alone but is amply justified by the record evidence.

A canvassing of the narrative record evidence does not substantiate the District Court's statement that a manual turning of the brake wheel would have to be performed on a moving car to be effective. This statement, if erroneous, is not vital to the basic conclusion that the record evidence failed to show negligence on the part of the Railroad. The Supreme Court in **Helvering v. Gowran**, 302 U. S. 238, 245 (1937), stated:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

See also **Lum Wan v. Esperdy**, 321 F. 2d 123, 126 (2nd Cir. 1963).

We have considered Industry's subsidiary allegations of error directed to the District Court's analysis of **Hahn**. Our examination of these claims shows them to be without merit.

Finally, Industry urges that public policy forbids a party to contract against liability based on its own negligence. The short answer is that the District Court properly held that Industry failed to discharge its burden of proving negligence on the part of Railroad. The Missouri court holds, as do most courts, that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts where such intention is not plainly expressed in the contract. As was held in **Buckeye Cotton Oil Co. v. Louis-**

ville & N. R. R., 24 F. 2d 347, 348 (6th Cir. 1928) and quoted in **Terminal R. Ass'n v. Ralston-Purina Co.**, 352 Mo. 1013, 180 S. W. 2d 693, 697 (1944):

> "There was no rule of public policy which forbade the Railroad Company from contracting with the oil company for indemnity against any damages which the railroad might be required to pay as the result of the ordinary negligence of its employees in operating engines and cars on these tracks."

In the instant case, the evidence was undisputed that local tariffs provide that the Railroad shall make a charge when it moves cars in intra-plant switching movements. No charge is levied if the Industry makes the move itself. Industry here moved the car first by use of the trackmobile and then by gravity after it was unloaded, and the Railroad made no charges for such movement. The Railroad in contracting for the indemnity did not contract against its liability. It was liable for Hahn's injury but there is no reason why it could not contract with the Industry to indemnify itself against the occurrence of any such loss while the car was being moved by Industry. This contract was made by the Railroad in its private capacity rather than as a common carrier and it could, therefore, relieve itself by indemnity, not only for its own negligence if the contract was sufficiently specific, but also against absolute liability as imposed by the statute.

In holding a contract releasing a railroad from liability not void as against public policy, notwithstanding a statute imposing absolute liability, the Court in **Sunlight Carbon Co. v. St. Louis & S. F. R. R.**, 15 F. 2d 802, 805 (8th Cir. 1926), said:

> "... on principle we perceive no reason why a railroad company may not, when acting in its private

capacity, relieve itself from absolute liability imposed by statute as well as from liability resulting from negligence. The reasoning justifying the rule in the latter case is equally applicable to the former."

See **Miller & Co. of Birmingham v. Louisville & N. R. R.**, 328 F. 2d 73, 78 (5th Cir. 1964), cert. denied 377 U. S. 966 (1964).

The Railroad questions the correctness of the District Court's holding that the provisions of the contract were not so definite and specific as to provide indemnity for liability based on negligence. We have heretofore indicated agreement with the District Court's conclusion that there was no evidence of negligence shown. It would serve no useful purpose to discuss this challenged conclusion for even if we agreed with the Railroad's interpretation, it would only serve as an additional ground for affirmance.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

(Judgment.)

United States Court of Appeals
For the Eighth Circuit.

No. 17,812.

September Term, 1964.

Colorado Milling and Elevator Company, a Corporation, Appellant, vs. Terminal Railroad Association of St. Louis, a Corporation.	Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

September 8, 1965.

APPENDIX C.

(Order Denying Petition of Appellant for a Rehearing.)

United States Court of Appeals
For the Eighth Circuit.

No. 17,812.

September Term, 1965.

Colorado Milling and Elevator Company, Appellant, vs. Terminal Railroad Association of St. Louis.	Appeal from the United States District Court for the Eastern District of Missouri.

Petition of Appellant for a rehearing filed in this cause having been considered, It is now here Ordered by this Court that the same be, and it is hereby, denied.

October 6, 1965.